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No. 09-865

Supreme Court, U.S.
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In The
Supreme Court of the United States

MONUMENTAL LIFE INSURANCE COMPANY
(SUCCESSOR IN INTEREST TO
COMMONWEALTH LIFE INSURANCE COMPANY),

Petitioner,

v.

DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY (f/k/a Revenue Cabinet); LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT (f/k/a Jefferson County, Kentucky and the City of Louisville, Kentucky); and KENTUCKY BOARD OF TAX APPEALS,

Respondents.

On Petition For A Writ Of Certiorari To The Kentucky Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner has properly preserved the issue of whether Section 514 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1144, "bars" the tax imposed by KRS 136.320, when the Kentucky Court of Appeals, Franklin Circuit Court and Kentucky Board of Tax Appeals ("KBTA") have all held that this issue has not been preserved for review?

2. If the answer to the first question is yes, whether ERISA "bars" the tax imposed by KRS 136.320, when the KBTA, as the finder of fact, held that even if the ERISA issue had been preserved, the petitioner made no showing that KRS 136.320 has any connection or reference to any benefit plan?

3. Whether the Kentucky Court of Appeals' decision that treating shares of stock ("Stock") as exempt intangible property with respect to the calculation of capital stock tax pursuant to KRS 136.320, when the exemption results in none of the tax liability being attributable, either directly or indirectly, to Stock, conflicts with *St. Ledger v. Kentucky Revenue Cabinet,* 517 U.S. 1206, 116 S.Ct. 1821, 134 L.Ed.2d 927 (1996), and *Fulton Corp. v. Faulkner,* 516 U.S. 325, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996), which held that remedies are an issue of state law, and other opinions of this Court, including *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed.2d 1072 (1983), which addressed indirect taxation?

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BRIEF IN OPPOSITION TO WRIT FOR CERTIORARI

COUNTERSTATEMENT OF THE CASE

Revenue (also "Department" or "Department of Revenue") disagrees with the Petitioner's Statement of the Case as well as with the Petitioner's representation of the questions presented for review. First, pursuant to Supreme Court Rule 14.1(g)(i), if review of a state-court judgment is sought, as in this case, the Petitioner is required to indicate in its Petition:

> specification of the stage in the proceedings, both ***in the court of first instance*** and in ***the appellate courts***, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and the pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . , so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

(Emphasis added.) *See also* Supreme Court Rule 24(1)(e); 28 U.S.C. § 1257(a).

Although Petitioner attempts compliance with this rule in its petition under the heading "Statement of the Case" (subheadings E and F), a simple review of the initiating documents involved in this matter and the record as a whole, clearly indicates that the

Kentucky Board of Tax Appeals (KBTA), the Franklin Circuit Court, and the Kentucky Court of Appeals were entirely correct when they determined that the Petitioner had failed to preserve any federal issue. This Court therefore lacks jurisdiction in this case since the question of whether or not the Petitioner failed to preserve an issue for review is a matter of state law rather than federal law, and the "unambiguous application of state procedural law makes it unnecessary for [this Court] to review the asserted claim." *Jimmy Swaggart Ministries v. Board of Equalization of California,* 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990), *citing Michigan v. Long*, 463 U.S. 1032, 1041-1042, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201 (1983).

Second, the Petitioner's recitation of the historical background of this case implores clarification. The Petitioner filed refund claims with the Department for the tax years 1990 through 1996, based on a lawsuit brought by other taxpayers challenging the constitutionality of certain statutes.[1] These were "protective refund claims" filed for the purpose of tolling the statute of limitations on refunds of state taxes. The reasoning was that if the taxpayers in the

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[1] *St. Ledger v. Revenue Cabinet*, 912 S.W.2d 34 (Ky. 1995), *cert. granted, judgment vacated by remand, St. Ledger v. Kentucky Revenue Cabinet*, 517 U.S. 1206, 116 S.Ct. 1821, 134 L.Ed.2d 927 (1996), *on remand, St. Ledger v. Revenue Cabinet*, 942 S.W. 2d 893 (Ky. 1997), *cert. dismissed, St. Ledger v. Kentucky Revenue Cabinet*, 521 U.S. 1146, 118 S.Ct. 27, 138 L.Ed.2d 1057 (1997).

St. Ledger case were successful in their challenge, the Petitioner would also be due tax refunds.

The statutes at issue in *St. Ledger* were Kentucky Revised Statutes (KRS) 132.020, which imposed the tax on specific property, including shares of stock; KRS 132.030, which lowered the tax rate on Kentucky, but not on out-of-state, bank deposits;[2] and KRS 136.030, which exempted individual stockholders of corporations who paid Kentucky tax on at least 75% of its total property from listing their stock for ad valorem tax purposes (the "Exemption Statute"). The Kentucky Supreme Court held that the Exemption Statute and the corporate shares tax portion of KRS 132.020 (the "Corporate Shares Tax") were unconstitutional, striking down both provisions. *St. Ledger*, 942 S.W.2d at 898.

But the Petitioner was taxed under KRS 136.320 – the Capital Stock Tax – not under KRS 132.020:[3] The Capital Stock Tax was a property tax based on the value of "capital," including Stock. Importantly, KRS 136.320 was not struck down by *St. Ledger*.

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[2] The bank deposits tax, KRS 132.030, is not an issue in this matter.

[3] " . . . and forty-five cents ($0.45) upon each one hundred dollars ($100) of value of all other property directed to be assessed for taxation shall be paid by the owner or person assessed except as provided in subsection (2) of this section **and KRS . . . 136.320, and other sections providing a different tax rate for particular property.**" *See* KRS 132.020(1), eff. July 13, 1990. (Emphasis supplied.)

However, since certain stocks taxed under the Corporate Shares Tax were exempted from intangible property tax, Revenue likewise treated the Petitioner's Stock as *exempt* intangible personal property for Capital Stock Tax purposes (the "Exemption Method").

The Petitioner was refunded $1,470,357.49 in Capital Stock Tax based on KRS 136.320, as applied in light of *St. Ledger*.[4] However, the Petitioner then claimed another $6,751,758.46 in refunds based upon its position that Stock must be *excluded* from the statutory taxing formula entirely, rather than exempted, when calculating Capital Stock Tax (Monumental's Exclusion Theory or "MET").

Revenue used information supplied by the Petitioner itself to calculate its Capital Stock Tax liability, as the tax was self-reporting.[5] The Kentucky Department of Insurance requires that insurance companies file a "Blue Book" with it each year. The "Blue Book" reports all of an insurance company's (including the Petitioner's) assets, except those found in any Separate Account. The Department of Revenue also required that the "Blue Book" be provided to it in order to verify the Petitioner's Capital Stock Tax returns. Importantly, Revenue did not know if the

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[4] KRS 136.320 was amended by act of the 1998 legislature, but this amendment does not affect this case.

[5] The Petitioner is no longer located in Kentucky and no longer files tax returns with Revenue.

Petitioner had Separate Accounts or not, unless it reported the value of those accounts to the Department on its property tax returns. Monumental Life Insurance never reported its Separate Accounts to Revenue and never included them on its tax returns.

Monumental employee Colleen Lyons testified that ***she usually*** filed the Petitioner's Capital Stock Tax returns with Revenue each year. (Record, Box 5, Vol. 30, Tab 151. This is the "Transcript of Evidence," hereinafter "TE," pp. 33-40.) Ms. Lyons testified that ***she always*** supplied Revenue the "Blue Book" with the returns, ***but never*** supplied Revenue a "Green Book" which set forth the assets held in Separate Accounts. (TE, pp. 97-99.) ("Green Book" found at Record, Box 4, Vol. 27, Tab 30.) In 1998, however, Ms. Lyons testified that ***she did not*** prepare or file the tax returns with Revenue. (TE, p. 51, 99, 215.) But in that same year, Revenue employee Edna Driskell did receive a "Green Book" for the first time ever from the Petitioner and questioned the Petitioner's failure to list its Separate Accounts on its property tax returns. (Record, Box 1, Vol. 3, Tab 49, pp. 51, 52.) An assessment was then made based upon the omitted property contained in the Separate Accounts for the years 1995 through 1998. (Record, Box 1, Vol. 5, Tab 67, pp. 90-93.)

This testimony is relevant to the Petitioner's continued and unfounded assertions that Revenue billed the Petitioner in response to its request for refunds, and that the Petitioner had never been taxed on its Separate Accounts before. Despite the single

dissenting opinion at the Kentucky Court of Appeals to the contrary, every witness deposed by the Petitioner disproved such a theory. It is more likely that the "Green Book" was sent to Revenue by mistake by an employee acting in Ms. Lyon's stead, which began the assessment inquiry. And the only reason that the Petitioner had not been taxed on its Separate Accounts previously is because it had never, in its entire history with the Commonwealth of Kentucky, provided the Department of Revenue with information showing it owned property in Separate Accounts. So while the Petitioner states that assets of this nature have not been subject to this tax "for decades," the truth is that the assets were always subject to the tax but the Petitioner did not report the assets as required by law. (*See* petition for writ, p. *i*.)

This matter was heard by the Kentucky Board of Tax Appeals ("KBTA") on July 16, 2002. The KBTA upheld Revenue's Final Ruling Letter in its December 4, 2003 Order. The Franklin Circuit Court's Opinion affirmed the KBTA on September 22, 2005. The Kentucky Court of Appeals issued its Opinion Affirming the Franklin Circuit Court on June 27, 2008. The Kentucky Supreme Court denied Discretionary Review on October 21, 2009. The Petition to this Court for a Writ of Certiorari to the Kentucky Court of Appeals followed.

REASONS FOR DENYING THE WRIT

A. THE PETITIONER HAS FAILED TO PRESERVE THE ERISA ISSUE FOR REVIEW BY THIS COURT.

In a transparent attempt to manufacture a circuit conflict warranting this Court's attention, Petitioner ignores the only real question presented: whether or not the Petitioner preserved the ERISA[6] issue for review. This is a question of state law, rather than federal law. *Jimmy Swaggart Ministries v. Board of Equalization of California,* 493 U.S. at 397.

This Court has clearly stated that "[w]ith 'very rare exceptions,' we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Campbell v. Louisiana*, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998), *citing Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997).

The Kentucky Court of Appeals, in support of its finding that it would not consider the issue of ERISA, cited the KBTA's Order that "[Monumental] failed to raise the issue of ERISA in its Petition of Appeal, or in any other pleading except its brief, including the pre-hearing compliance statement and the

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[6] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.

supplemental pre-hearing compliance statement." But the Court also concluded that "Monumental does not cite us to its preservation of this issue as required by CR 76.12(4)(c).[7] *Shelton v. Commonwealth,* 992 S.W.2d 849, 852 (Ky. App. 1998)." *Monumental Life Ins. Co. v. Department of Revenue*, 294 S.W.3d 10, 22 (2008). Hence, the Petitioner has failed to preserve the federal ERISA issue at *both* the court of first instance – the KBTA, *and* at the Kentucky Court of Appeals. The Petitioner has therefore failed to preserve the ERISA question for review not once, but twice and in two separate forums.

Further, the Petitioner's argument to the contrary, it is the KBTA – not the Franklin Circuit Court that was, and is, the court of first instance and the finder of fact in this case. While the Petitioner argues that the appeal to the Franklin Circuit Court was an *original* action, and that the federal issue was preserved at that level, the United States Supreme Court, the Kentucky Court of Appeals, the law in Kentucky and common sense disagree. (*See* petition for writ, p. 18.)

Pursuant to KRS 131.110, a taxpayer is required to protest any assessment or denial of a refund request directly to the Department of Revenue. The

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[7] The Kentucky Rules of Civil Procedure 76.12(4)(c)(v) requires that the Petitioner's Court of Appeals brief " . . . . shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

protest must be in writing and accompanied by a supporting statement "*setting forth the grounds upon which the protest is made.*" KRS 131.110(1). After consideration of the written protest and the supporting statement, the Department is required to issue a final ruling to the taxpayer. In this case, the Petitioner's protest and its supporting statement never mentioned any federal ERISA issue, and no argument was ever presented that the ERISA issue should be considered by the Department.

If the taxpayer disagrees with the Department's final ruling, it may file a petition of appeal with the KBTA pursuant to the terms of KRS 131.340. KRS 131.110(5). KRS 131.340(1) states that "[t]he Kentucky Board of Tax Appeals is hereby vested with exclusive jurisdiction to hear and determine appeals from final rulings. . . ." It further states that hearings before the KBTA "shall be de novo and conducted in accordance with KRS Chapter 13B." In turn, Chapter 13B sets forth the KBTA's authority to issue administrative regulations governing the conduct of hearings. "An agency shall have authority to promulgate administrative regulations that are necessary to carry out the provisions of this chapter." KRS 13B.170(1). The KBTA's administrative regulations specifically require the petition of appeal to "**contain a statement of all relevant issues of fact and law.**" 802 KAR 1:010(2)(e). (Emphasis added.) In this case, the Petitioner's petition of appeal to the KBTA, although well over 60 pages in length and containing a multitude of issues and arguments, never once

mentioned an ERISA issue. Likewise, pursuant to the KBTA's Order and its administrative regulations, the parties are required to file pre-hearing statements with the Board. The Order and the administrative regulations required the parties to plead "the party's position on any issue of fact in dispute" and "the party's position of any issue of law raised by the appeal." 802 KAR 1:010(6)(a) and (b). The Petitioner did file its prehearing statement as well as a supplemental prehearing statement, but nowhere did the Petitioner raise a federal ERISA issue. Indeed the first mention of the ERISA issue, over objection, was presented at the KBTA hearing.

From the KBTA, an appeal can be taken by an aggrieved party to the Circuit Court. KRS 131.370. This appeal must comply with "KRS 13B." KRS 131.370(1). In turn, KRS Chapter 13B sets forth the legal perimeters within which the Circuit Court can consider the appeal. That statute states as follows:

> **13B.150 Conduct of judicial review.**
>
> (1) Review of a final order shall be conducted by the court without a jury and **shall be confined to the record**, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request, may hear oral argument and receive written briefs.
>
> (2) **The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.** The court may affirm the final order

> or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Without support of substantial evidence on the whole record;
>
> (d) Arbitrary, capricious, or characterized by abuse of discretion;
>
> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
>
> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2) or;
>
> (g) Deficient as otherwise provided by law.

(Emphasis added.)

This statute and the other laws and administrative regulations governing the appeal of tax cases defines the role of the Circuit Court as being one of a reviewing and appellate Court, rather than an initial trier of fact. The law ensures that the aggrieved party has a right of appeal to both the Circuit Court and the Kentucky Court of Appeals by making the initial appeal to the Circuit Court an original action. The

law does not confer upon the aggrieved party the right to raise new issues and arguments at the Circuit Court level. Hence, this case is directly on point with this Court's decision rendered in *Jimmy Swaggart Ministries v. Board of Equalization of California,* 493 U.S. at 397, 398, in which this Court stated:

> We decline to reach the merits of this claim, however, because the courts below ruled that the claim was procedurally barred.
>
> Thus, under state law, "[t]he claim for refund delineates and restricts the issues to be considered in a taxpayer's refund action. The trial court and [appellate] court are without jurisdiction to consider grounds not set forth in the claim." *Atari, Inc. v. State Board of Equalization,* 170 Cal.App.3d 665, 672, 216 Cal.Rptr. 267, 271 (1985) (citations omitted). This rule serves a legitimate state interest in requiring parties to exhaust administrative remedies before proceeding to court, for "[s]uch a rule prevents having an overworked court consider issues and remedies available through administrative channels." *Id.,* at 673, 216 Cal.Rptr., at 272.
>
> The record in this case makes clear that appellant, in its refund claim before the Board, failed even to cite the Commerce Clause or the Due Process Clause, much less articulate legal arguments contesting the nexus issue.

In another case considered by this Court, the Petitioner sought to raise a res judicata defense. This Court declined to address that issue, holding that the Illinois Appellate Court's ruling that the Petitioner neither formally pled nor attempted to prove its claim at the circuit court level " . . . constitutes an adequate state ground that forecloses any jurisdiction that we might possess to review the merits of the res judicata defense." *Cousins v. Wigoda*, 419 U.S. 477, 955 S.Ct. 541, 42 L.Ed.2d 595 (1975), *citing Louisville & N.R. Co. v. Woodford*, 234 U.S. 46, 345 S.Ct. 739, 58 L.Ed. 1202 (1914).

Such is the situation here. Petitioner's failure to preserve the ERISA issue constitutes an adequate state ground warranting denial of the petition. Kentucky law is very clear that a litigant must raise an issue before the administrative tribunal. *Urella v. Kentucky Bd. of Med. Licensure*, 939 S.W.2d 896 (Ky. 1997). In *Urella*, the Kentucky Supreme Court agreed with the administrative agency's decision that the Petitioner's argument was not preserved for review, stating:

> . . . having reviewed the record, we agree with the Board that this argument is not preserved for review. It was not presented to the ALJ, nor to the Board until 10 days after oral arguments. Neither was the issue addressed by the trial court or Court of Appeals. It is well established that failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review, or as an initial matter on discretionary review to this court.

> *Jackson v. State Auto. Mutual Insurance Company*, Ky., 837 S.W.2d 496, 498 (1992); *Personnel Board v. Heck*, Ky.App., 725 S.W.2d 13, 17 (1987).

Id. at 873. *See also*, *Stoner Creek Stud v. Revenue Cabinet*, 746 S.W.2d 73 (Ky. App. 1987); (Emphasis supplied.)

In the this case, the Court of Appeals upheld the KBTA's decision not to review issues which were not raised in the initial protest and supporting statements to the Department of Revenue, the Petition of Appeal to the KBTA, the prehearing compliance statement or the supplemental prehearing compliance statement. *Stoner Creek Stud*, 746 S.W.2d 73. The administrative tribunal and state courts properly applied state law to hold that procedurally, Petitioner failed to preserve the ERISA issue for review. While Petitioner disagrees with this conclusion, ultimately, the issue of whether the ERISA issue was preserved for review is purely a state procedural issue, and there simply is no federal issue for this Court to consider.

The Kentucky Court of Appeals' Opinion, from which the petition herein is taken, declined to address the ERISA issue at all. Even so, the Petitioner continues to concentrate on the substantive merits of the ERISA issue, while mendaciously glossing over its neglect in raising the ERISA question prior to the hearing. Its argument of course, begs response.

Says the Petitioner:

> [i]n its Petition of Appeal to the Board, Monumental *raised the Separate Accounts issue* and, *through discovery* and at the *hearing, introduced evidence supporting* its argument that ERISA preempted Kentucky's taxation of Separate Account assets.

(*See* petition for writ, p. 16; emphasis added.)

As with the lower Courts, the Petitioner uses this distortion of the facts in a thinly veiled attempt to convince this Court that the federal ERISA issue was actually raised before the Department of Revenue and the KBTA. Such was not the case.

The truth of the matter is simply this: the Petitioner's petition of appeal to the KBTA ***did not include ERISA in its*** "**statement of all relevant issues of fact and law**." 802 KAR 1:010(2)(e). (Emphasis added.) Importantly, the Petitioner has not and cannot counter this fact. Nor did the Petitioner plead ERISA in its "**position on any issue of fact in dispute**" or in its "**position on any issue of law raised by the appeal**." 802 KAR 1:010(6)(a) and (b). (Emphasis added.) And despite its feeble attempt, the Petitioner cannot now logically argue that a question it asked during one of a multitude of depositions (the Petitioner's "*discovery*") somehow preserved the ERISA issue for review. With absolutely no mention of the ERISA issue in any pleading prior to the post hearing brief, whatsoever, it simply cannot logically be argued (as the Petitioner attempts to do) that the

issues in this case were so closely related that the phrasing of the protest and appeal to Revenue and KBTA sufficiently included the federal pre-emption issue. *Babcock and Wilcox Company v. Revenue Cabinet,* 203 S.W.3d 149 (Ky. 2006). For example, the Petitioner argued a multitude of reasons why its property was not subject to tax: the doctrine of contemporaneous construction; the property had no value; the tax was not a property tax but an "in lieu of" tax; accord and satisfaction, etc. Not once is there mention of ERISA.

B. ERISA DOES NOT PRE-EMPT KRS 136.320.

The *Urella* Court also held, just as the KBTA did here, that even if the issue before it was preserved for review, the result would not have been different: "Nor would the result be different had the issue been properly preserved." *Urella*, 939 S.W.2d at 873.

The KBTA in this case found that KRS 136.320 has not been shown to have any connection or reference to any benefit plan; that it does not burden any ERISA plan that may exist; that it does not infiltrate the relationship between employees and their employers or their plan and is a neutral tax of general application. (KBTA Order, pp. 9, 10.) The Petitioner argues that the KBTA's reliance on *Miller v. PPG Indus., Inc.*, 237 F. Supp. 2d 756 (W.D. Ky. 2002) is inapplicable and misplaced because the "ad valorem tax at issue in this case has much more than a remote or peripheral connection; it is, as discussed

supra, intimately connected." (*See* petition for writ, p. 30.) The Petitioner then fails to explain exactly how it is "intimately connected," and cites no authority for its position.

The Petitioner has also argued that there is a "growing split across the nation" with circuit courts of appeals and state courts concerning the ERISA issue. (*See* petition for writ, p. 31.) But it has not pointed to any genuine conflict with prior decisions of this Court or with any other circuit. Rather, it simply admonishes this Court for failing to "give proper weight to the clear text of ERISA" and for "mov[ing] away" from the intent of Congress in its rendition of the Opinion in *De Buono v. NYSA-ILA Medical and Clinical Services Fund,* 520 U.S. 806, 814-15, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997). (*See* petition for writ, pp. 25, 26.) Merely calling attention to this Court's decision in *De Buono* and expressing dissatisfaction with that decision does not satisfy this Court's requirement that a writ of certiorari will be granted only for compelling reasons.

Of course, *De Buono v. NYSA-ILA Med. & Clinical Serv. Fund*, 520 U.S. 806, is right on point in this matter. The issue in that case was whether a tax imposed upon gross receipts from patients using diagnostic services was a tax of general application having only an incidental impact on benefit plans, or a tax that "relates to" an ERISA fund by reducing the amount of fund assets, and therefore pre-empted. These fund assets, if not paid in taxes, would otherwise be available to provide plan members with

benefits, and a reduction in assets could cause the plan to limit its benefits or to charge plan members higher fees. The Second Circuit Court of Appeals held that ERISA pre-empted the tax statute because the tax reduced the fund's assets. But this Court remanded the case to the Second Circuit to reconsider the matter in light of its recently issued decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), in which no pre-emption was found.

However, the Second Circuit reinstated its judgment, distinguishing *Travelers* on the ground that the statute at issue there had only an indirect economic influence on the assets and the decisions of ERISA plan administrators, whereas the tax it was considering depleted the fund's assets directly, and thus had an immediate impact on an ERISA plan's assets and operations. The United States Supreme Court overturned the Second Circuit decision and held that Section 514(a) does not preclude New York from imposing a gross receipts tax on ERISA funded medical centers. It found that the Second Circuit relied substantially on an expansive and literal interpretation of the words "relate to" in § 514(a) of ERISA, and failed to give proper weight to *Travelers'* rejection of such a strictly literal reading.

In *Travelers*, the Court had unequivocally concluded that the "relates to" language was not intended to modify "the starting presumption that Congress does not intend to supplant state law." 514

U.S. at 654, 115 S.Ct. at 1676. This Court in *De Buono* held that the supposed difference between direct and indirect impact on the fund's assets – upon which the Second Circuit relied in distinguishing this case from *Travelers* – could not withstand scrutiny. The Supreme Court concluded that just because a tax may impact a fund's assets, that does not mean that pre-emption has occurred. Indeed, this decision undermines the Petitioner's entire argument that KRS 136.320 is "intimately connected" to the Separate Accounts and therefore pre-empted.

Importantly, the United States Supreme Court, the Sixth Circuit Court of Appeals and the U.S. District Court for the Western District of Kentucky, have *all* upheld a taxing authority's historical and fundamental right to tax without federal interference via ERISA. These opinions are consistent with the basic principles of federalism and comity between the federal and state governments, and between federal courts and state governments. In *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003), the Supreme Court was confronted with whether Kentucky had the right to impose a law on insurance companies requiring them to use any "willing provider," rather than a "closed network" of doctors, as an approved provider in their health plans. Following a decision by Sixth Circuit Court of Appeals affirming the District Court, the United States Supreme Court noted that ERISA explicitly preserves the validity of state "law[s] . . . which regulate insurance" under § 1144(b)(2)(A). *Id.*

at 1475. The Supreme Court also noted that the McCarran-Ferguson Act, 15 U.S.C. § 1012 requires that "No Act of Congress shall be construed to invalidate, impair or supersede ***any law enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business*** . . . " *Id.* at 1476, fn. 2. (Emphasis supplied). *See also* 29 U.S.C. § 1144(b)(2)(A). In this case, KRS 136.320 was titled "Tax on taxable capital of domestic life insurance companies in lieu of other taxes." Clearly, this statute is intended to tax insurance companies. Moreover, Kentucky law is clear that "Amounts allocated by domestic life insurers to separate accounts in the exercise of the power granted by this section ***shall be owned*** by the insurer ***and the insurer shall not be, or hold itself to be, a trustee***, in respect to such amounts." KRS 304.15-390(6). (Emphasis supplied.)

The Western District of Kentucky reached a similar decision when concluding that a Louisville/ Jefferson County municipal occupational tax was not pre-empted by ERISA. *Miller*, 237 F. Supp. 2d at 756. In that matter, Miller sued his employer, PPG, in Jefferson Circuit Court, alleging that PPG failed to make proper contractual payments owed to Miller once he became disabled. PPG removed the case to federal court arguing that ERISA pre-empted all three of Miller's claims. *Id.* at 757-58. Miller then filed a motion to remand the case back to state court.

PPG argued that ERISA pre-empted the occupational license tax provisions, so as to give the

federal court jurisdiction over the matter. In terms of pre-emption, then, the question before the court was whether ERISA pre-empted the "insurance payments" exception to the municipal occupational license tax. However, the court held:

> *. . . the Supreme Court has also more recently sought to preserve the principle that "the preemption provision . . . is not without limits," Kentucky Assoc. of Health Plans, Inc. v. Nichols*, 227 F.3d 352, 358 (6th Cir. 2000), and has critiqued the emphasis on the ERISA text as an "uncritical literalism" that makes ERISA preemption turn on "infinite connections." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). Thus, in *Travelers*, the Supreme Court held that ERISA's "relate to" language was not intended to modify "*the starting presumption that Congress does not intend to supplant state law.*" *Id.* at 705, 115 S.Ct. 1671. *The preemption analysis therefore begins by first analyzing "whether the normal presumption against preemption has been overcome in a particular case." Id.; see also De Buono v. NYSA-ILA Medical & Clinical Services Fund*, 520 U.S. 806, 814-15, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997).
>
> To determine if this presumption has been overcome, the Supreme Court's approach requires courts to "go beyond the unhelpful text and the frustrating difficulty of defining its key term, and *look instead to the*

> *objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." De Buono*, 520 U.S. at 813-14, 117 S.Ct. 1747; *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 147, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001); *Associated Builders & Contractors v. Perry*, 115 F.3d 386, 392 (6th Cir. 1997) (noting that the "most recent Supreme Court approach" requires courts to look instead at the purpose of ERISA rather than the overly expansive "relate to" test).

Id. at 760-761. (Emphasis supplied.)

Miller specifically relied on two Sixth Circuit cases, both dealing with issues of state and local taxation in the ERISA context, which support Revenue's position herein. The *Miller* court discussed the cases of *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987) ("tax has no connection or reference to the benefit plans. The tax commissioner has not directed any action at the plan contribution or payments," and the tax is a "neutral tax of general application." *Id.* at 554); and *Thiokol Corp. v. Roberts*, 76 F.3d 751 (6th Cir. 1996) (municipal occupational tax in no way infiltrates the relationship between employers or plans and their employees, but rather affects the relationship between the state and a taxpayer – an area where "ERISA has nothing to say" (Emphasis supplied.)

As a result, the court held that PPG failed to overcome the starting presumption that "Congress

did not intend to supplant state law," and declined to find ERISA pre-emption of the Louisville/Jefferson County insurance exemption. *Id.* at 762.

The rule of law set down by the United States Supreme Court, the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Western District of Kentucky must be followed in this case. "[T]he preemption provision . . . is not without limits." *Miller* at 760; *quoting Kentucky Assoc. of Health Plans, Inc. v. Nichols*, 227 F.3d 352, 358 (6th Cir. 2000). The pre-emption analysis therefore begins by first analyzing "whether the normal presumption against pre-emption has been overcome in a particular case." *Id. See also De Buono*, 520 U.S. at 814-15.

A cursory review of the transcript of evidence in this case shows not only has the presumption against pre-emption not been overcome by the Petitioner, but also that ***no attempt to overcome the presumption was even made***. Aside from general testimony that Separate Accounts *might* be retirement accounts, absolutely no evidence was offered to show that Separate Accounts were ERISA qualified accounts, or more importantly, that ERISA somehow pre-empts KRS 136.320. Nowhere is there proof, testimony or otherwise, that KRS 136.320 has any connection or reference to the "retirement plans" that Separate Accounts are claimed to be. No proof was offered that indicates that KRS 136.320 takes any action directed at the plan contributions or payments. There was no

proof, obviously, because the Petitioner had just raised the ERISA issue on the day of the hearing.

KRS 136.320 is simply a *neutral property tax of general application,* and does not burden Separate Accounts or affect their operation. It does not infiltrate the relationship between employers or plans and their employees. Rather it affects the relationship between the state and the Petitioner – the taxpayer – an area where "ERISA has nothing to say." *Miller*, 237 F. Supp. 2d 756; *Firestone*, 810 F.2d 550; *Thiokol*, 76 F.3d 751. Clearly, the Court of Appeals properly concluded that the Petitioner's argument concerning ERISA's pre-emption of KRS 136.320 was not preserved for review, and the KBTA properly determined that even if the issue was preserved, it was baseless.

C. *ST. LEDGER* DID NOT INVOLVE THE CAPITAL STOCK TAX.

1. Background Concerning Calculation of Capital Stock Tax.

Capital Stock Tax liability is calculated pursuant to KRS 136.320. As illustrated by the chart below,[8] the "Total Taxable Value of Capital" ("TTVC"), is based on the fair cash value of certain intangible

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[8] Items #1-3 for each Chart come from Appellant's Annual Report of Domestic Life Insurance Companies as of the beginning of business Jan. 1, 1996 ("1996 Annual Report"). (Box 4, Vol. 28, Tab 49).

personal property, or capital ("Total Capital"), less *exempt* intangible personal property ("Exempt Property"). A statutory formula allocates TTVC between reserves ("Reserves") and nonreserves, also referred to as capital ("Capital/Nonreserves"). KRS 136.320(2). A company ascertains and reports its "Net Reserves" (Reserves less due and deferred premiums). KRS 136.320(1)(c). Next, a ratio is determined, which equals TTVC divided by Total Capital (the "Ratio"). KRS 136.320(2)(b). Net Reserves are multiplied by the Ratio to compute taxable Reserves. *Id.* Taxable Reserves are deducted from TTVC to calculate Taxable Capital/Nonreserves. KRS 136.320(2)(a). Again, taxable Reserves are taxed at a significantly lower rate:

Capital Stock Tax Return Calculations	All Assets (Stock & Non-Stock)	Non-Stock Assets	Stock
1. Net Reserves	2,782,888,351	2,569,123,985	213,764,366
2. Fair Cash Value of Capital	3,051,556,416	2,817,154,622	234,401,794
3. TTVC (#2 minus $148,054,938 in Exempt Intangible Property (other than Assets))	2,903,501,478	2,669,099,694	234,401,794

4. Ratio: TTVC to Fair Cash Value (#3 divided by #2)	0.9515	0.9474	1.0000
5. Taxable Reserves (#1 multiplied by #4)	2,647,868,608	2,434,104,242	213,764,366
6. Taxable Capital/ Nonreserves (#3 minus #5)	255,632,870	234,995,442	23,167,455
7. Tax on Reserves (#5 multiplied by Tax Rate of $.001/$100)	26,479	24,341	2,138
8. Tax on Capital/ Nonreserves (#6 multiplied by Tax Rate of $0.70/$100)	1,789,430	1,644,968	144,462
9. Total Tax (#8 + #9)	1,815,909	1,669,309	146,600
10. % of TTVC Allocated to Taxable Reserves	0.911957038	0.911957038	0.911957038

When Stock is taxed, 91% of all taxable assets, including Stock, are attributed to taxable Reserves.

Stock, as listed in the Petitioner's 1996 Annual Report, equaled $234,401,794. Therefore, the tax liability attributable to Stock is $146,600 ($2,318 in tax on Reserves plus $144,462 in tax on Capital/Nonreserves). If Stock is not taxed, the tax liability is $146,600 less, assuming non-Stock taxable assets ("Taxable Assets") remain the same. This is because similar property must be taxed similarly. Ky. Const. § 174.

The Ratio is critical, as it allocates a proportionate share of Exempt Property to Net Reserves. Without the Ratio, *all* Exempt Property is attributed to taxable Capital/Nonreserves, and taxable Reserves are artificially inflated. Notably, the Petitioner *itself exempts* Exempt Property on its returns.[9] Appellant has never objected to Exempt Property being exempted, although presumably the same taxation concerns would apply.

It is clear that, if it were not for the fact that two (2) tax rates are applied, one for Reserves and one for Capital/Nonreserves, there would be no dispute. That is, if the $0.70 per $100 value tax rate applied to all taxable assets, it would not matter whether Stock was "excluded" or "exempted"; the tax liability would be the same. However, the ultimate tax liability differs by more than $1.4 million, which is traced to the

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[9] The 1996 Annual Report lists $148,054,938 in non-Stock Exempt Property. (Box 4, Vol. 28, Tab 49)

application of the Ratio to Net Reserves to calculate taxable Reserves.

Net Reserves are part of TTVC, and a certain percentage of TTVC is allocated to taxable Reserves. Just as both the Statement Value of Capital and Fair Cash Value of Capital are less under MET (because Stock is excluded from those amounts), Net Reserves should also be less. However, as shown by the chart below, this does not occur:

Capital Stock Tax Return Calculations	Stock Taxed as Capital	MET	Difference
1. Fair Cash Value of Capital	3,051,556,416	2,817,154,622	234,401,794
2. TTVC (#1 minus $148,054,938 in Exempt Property (other than Stock))	2,903,501,478	2,669,099,694	234,401,794
3. Ratio: TTVC to Fair Cash Value (#2 divided by #1)	0.9515	0.9474	N/A
4. Taxable Reserves ($2,782,888,351 in Net Reserves multiplied by #3)	2,647,868,608	2,636,634,269	11,234,339

5. Taxable Capital/ Nonreserves (#2 minus #4)	255,632,870	32,465,415	223,167,455
6. Tax on Reserves (#4 multiplied by Tax Rate of $.001/$100)	26,479	26,366	113
7. Tax on Capital/ Nonreserves (#5 multiplied by Tax Rate of $0.70/$100)	1,789,430	227,258	1,562,172
8. Total Tax (#6 + #7)	1,815,909	253,624	1,563,285
9. % of TTVC Allocated to taxable Reserves	0.911957038	0.987836567	0.047927700
10. % of TTVC Allocated to taxable Capital/ Nonreserves	0.088042962	0.012163433	0.952072300

The second column of this table *includes* Stock in Capital, while the third column *excludes* Stock pursuant to MET. The final column shows the difference between the two methods, which should equal the tax liability attributable to Stock, or $146,600.

However, under MET, the tax liability decreased by $1,562,285, an amount ten times greater than expected! Disturbingly, by virtue of excluding Stock, the Petitioner pays *$1.4 million less* tax than another taxpayer who owns an *identical* amount of Taxable Assets, but has no Stock to exclude. While the Petitioner alleges that the Exemption Method is unconstitutional, MET unconstitutionally taxes identical assets differently. This $1.4 million difference results from the failure of MET to exclude any Stock from Net Reserves. As shown above, while more than *90%* of total Capital is allocated to Net Reserves, less than *5%* of Stock is allocated to Net Reserves under MET.

This also affects taxable Reserves, as the tax liability decreases by only $113 and not the full amount attributable to Stock: $2,138. Under the MET, a company pays $2,125 more in tax on taxable Reserves than a company who owns the same amount of Taxable Assets, but has no Stock to exclude. This is hidden by (i) the low tax rate on taxable Reserves, and (ii) the tremendous decrease in taxable Capital/ Nonreserves, which combine for a decrease in the overall tax liability. If there is any taxation of Stock, it is through the MET, which effectively increases taxation of taxable Reserves. *National Life Ins. Co. v. United States*, 277 U.S. 508, 579, 48 S.Ct. 591, 72 L.Ed. 968 (1928). This result is also at odds with Petitioner's insistence that Stock must be excluded from the formula.

However, if a proportionate share of Stock, 91% is excluded from Net Reserves (the "True Exclusion

Method"), as shown below, it is interesting to note the result:

Capital Stock Tax Return Calculations	Stock Taxed as Capital	True Exclusion Method	Difference
1. Net Reserves	2,782,888,351	2,569,123,985	213,764,366
2. Fair Cash Value of Capital	3,051,556,416	2,817,154,622	234,401,794
3. TTVC (#2 minus $148,054,938 in Exempt Intangible Property (other than Stock))	2,903,501,478	2,669,099,694	234,401,794
4. Ratio: TTVC to Fair Cash Value (#3 divided by #2)	0.9515	0.9474	N/A
5. Taxable Reserves (#1 multiplied by #4)	2,647,868,608	2,434,104,242	213,764,366
6. Taxable Capital/ Nonreserves (#3 minus #5)	255,632,870	234,995,442	23,167,455
7. Tax on Reserves (#5 multiplied by Tax Rate of $.001/$100)	26,479	24,341	2,138

8. Tax on Capital/ Nonreserves (#6 multiplied by Tax Rate of $0.70/$100)	1,789,430	1,644,968	144,462
9. Total Tax (#8 + #9)	1,815,909	1,669,309	146,600
10. % of TTVC Allocated to Taxable Reserves	0.911957038	0.911957038	0.911957038

When the True Exclusion Method is used, the inconsistencies resulting from MET disappear. The reduction in tax liability is the expected amount, $146,600, and the taxation of Reserves vanishes, as tax liability is again reduced by $2,138. All TTVC is allocated between taxable Reserves and Capital/ Nonreserves, so taxpayers owning the same amount of Taxable Assets have the same tax liability, *regardless* of whether they also own Stock. If the Petitioner wishes to exclude Stock from the calculation of Capital Stock Tax liability, a proportionate share of Stock must also be excluded from Net Reserves, because of the nature of the formula, and this it has failed to do.

In addition to the fundamental errors already identified, there are other problems related to MET that demonstrate its flawed nature. For example, as shown in the 1995 tax return, under MET, taxable Reserves *exceed* TTVC. As a result, 105% of TTVC is

taxed as taxable Reserves, while taxable Capital/Nonreserves is approximately *negative* $140 million. Neither figure makes any sense. Taxing taxable Reserves at 105% of TTVC essentially taxes these assets above fair cash value, violating the Kentucky Constitution. *Fitzpatrick v. Patrick*, 410 S.W.2d 143, 145-146 (Ky. 1966). The creation of a negative amount of taxable Capital/Nonreserves is the *only* way Petitioner can avoid paying tax on more than 100% of its TTVC.

Judge Thompson, in his dissent, which Petitioner cites on page 13 of its petition, addresses none of this, holding only that because the Exemption Method results in a higher tax assessment, it must tax Stock. As the majority correctly noted:

> Monumental's method, however, results in what we believe to be a manifestly illogical result. For example, under the method proposed by Monumental, its 1995 tax return would report total capital equal to negative $145 million. Such a result cannot be reconciled with the sort of logic one normally expects to find in tax statutes.
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> Moreover, if the situation is considered whereby two hypothetical domestic life insurance companies with the same dollar amount of "taxable capital," one with substantial stock holdings and the other with little or no stock in its investment portfolio, the former would pay much less tax. Such disparate treatment would violate Section 171 of the Kentucky Constitution, which

> requires uniform taxation of all property within the same class. This difficulty is avoided entirely if the stock is exempted rather than excluded in calculating the tax.

Monumental Life, 294 S.W.3d at 20.

2. The Petition Fails to Demonstrate Any Conflict Between The Kentucky Court of Appeals' Holding on Stock and This Court's Precedents in *St. Ledger* and *Fulton*.

Petitioner makes a bold and unsupported assertion that the Court of Appeals' holding in this case is in direct conflict with this Court's holdings in *St. Ledger* and in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996). However, the sole basis for Petitioner concluding that such a direct conflict exists is that Petitioner believes it should be entitled to an even greater refund than it received even though the facts, the statute and the law all fail to support Petitioner on this point.

In *St. Ledger*, this Court held only that the case should be remanded to the Kentucky Supreme Court in light of *Fulton*. What this Court held in *Fulton* was that "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." *Fulton*, 516 U.S. at 346, quoting *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496

U.S. 18, 39-40, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). Moreover:

> . . . a State might refund the additional taxes imposed upon the victims of its discrimination or, to the extent consistent with other constitutional provisions (notably due process), retroactively impose equal burdens on the tax's former beneficiaries. A State may also combine these two approaches. Ibid. These options are available because the Constitution requires only that "the resultant tax actually assessed during the contested tax period reflec[t] a scheme that does not discriminate against interstate commerce." Id. at 41.

Fulton, 516 U.S. at 346-47. This Court finally concluded:

> Where "the federal constitutional issues involved [in the remedial determination] may well be intertwined with, or their consideration obviated by, issues of state law," our practice is to leave the remedy for the state supreme court to fashion on remand.

Id. at 347, *quoting Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 104 S.Ct. 3049, 3058, 82 L.Ed.2d 200 (1984), and *Tyler Pipe Industries v. Dept. of Revenue*, 483 U.S. at 252, 107 S.Ct. at 2822. *See also Williams v. Vermont*, 472 U.S. 14, 28, 105 S.Ct. 2465, 2474, 86 L.Ed.2d 11 (1985).

Notably, the Petitioner received a $1,470,357.49 refund as a result of the Department exempting stock.

As a result, Petitioner received a refund of the additional ad valorem taxes imposed on its shares of stock, which is consistent with this Court's directives in both *St. Ledger* and in *Fulton*.

However, Petitioner insisted it was entitled to an additional refund in the amount of $6,751,758 in refunds, based on its erroneous belief that Stock must be treated a different way. The Commerce Clause was not intended to grant interstate commerce a tax windfall. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 82 L.Ed. 823 (1938). Simply because Petitioner could be entitled to a larger refund under some other method does not mean that Stock is being taxed, and the facts of this case shows that this is indeed the case – Stock is not taxed under the Exemption Theory.

Notably, whether the Exemption Method is used, the True Exclusion Method is used, or the tax liability attributable to Stock is subtracted from the total tax liability, the result is the same. This makes sense as exempting Stock from tax and excluding Stock from tax *should* have the same result. As the chart clearly shows, Stock is not taxed, as the difference in total tax liability under the Exemption Method is due *solely* to Stock's exempt status, no more, no less.

This result is consistent with the examples presented to Petitioner's own expert, Richard Pomp. (TE, pp. 130-132) In the first example, A and B each owned $100 of stock (A and B's other assets and tax liability were assumed to be the same). A's stock was

taxed at 6%, so A paid an additional $6 in tax, while B's stock was treated as exempt, and B paid no additional tax. When asked if B was taxed on the stock in this example, Richard Pomp testified that "if there is no tax at all, I would say he is not being directly taxed." (TE, pp. 131-132) The second example taxed half of A's stock at 2% and half of A's stock at 6%, while B's stock was again exempted. *Id.* Again, if A paid $4 in tax on $100 in stock, and B paid no tax on $100 of stock, Pomp testified that B would *not* be taxed on the stock (TE, p. 132) Again, no tax is paid on Stock under the Exemption Method, therefore, *even the Petitioner's expert* agreed Stock is not taxed.

Obviously, if Stock is not being taxed in the first place, double taxation of Stock is an impossibility. The Court of Appeals' interpretation of the Bank Shares Tax is completely consistent with the holding in *St. Ledger*. This interpretation gets to the same place as *St. Ledger*, where Stock is not taxed, either directly or indirectly, while under the Petitioner's theory, the taxation of taxable Reserves is increased. It is only because of the much lower rate associated with taxable Reserves that the total tax liability appears to be less.

As clearly and consistently shown, the amount the Petitioner was refunded was equal to the amount of Bank Shares Tax attributable to the Stock, no more, no less. Nothing in this Court's opinions mandates a different result, and there is no conflict between these opinions and the Court of Appeals' decision.

a. The Court of Appeals' Decision to Treat Stock as Exempt Intangible Assets is Consistent with this Court's Opinions.

Tellingly, Petitioner has pointed to no conflict with prior decisions of this Court. To be sure, Petitioner has strung together various snippets, including dissenting opinions, in an effort to support such a claim. Pet. pp. 37-39. But one searches the petition in vain for a summary of the facts, an explanation of the holding, or any attempt to put the decisions in context, and Petitioner makes no serious effort to show that they conflict with the ruling below.

For example, Petitioner insists it was entitled to an additional refund in the amount of $6,751,758, based on its erroneous belief that Stock must be treated a different way. The test advocated by Petitioner "still less tax under another theory," is not the correct test. The test used by this Court in *National Life* was whether the taxpayer derived any tax benefit from federally exempt securities. *National Life*, 277 U.S. at 519. This Court compared the tax liability for a company with tax-exempt securities against what the tax liability would be if the securities were not exempt, and concluded the tax liability was the *same* in both scenarios. As a result, the tax exemption was effectively, and impermissibly, disregarded. *Id.* However, as shown above, the Exemption Method satisfies the *National Life* test, and there is no conflict.

For example, Petitioner mischaracterizes the holding in *American Bank & Trust Co. v. Dallas Co.*, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed.2d 1072 (1983). Petitioner states that this Court held the tax [on federal obligations] is barred regardless of its form if federal obligations must be considered, either directly or indirectly, in computing the tax." *Id.* at 862. Specifically, Rev. Stat. § 3701 exempted certain federal obligations from taxation by the states, and expressly provided that "[t]his exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax. . . ." *Id.* at 859. Texas had a bank shares tax, which determined the taxable value of the bank shares by including the value of these federal obligations. As a result, a portion of the tax was attributable to the exempted federal obligations. The plaintiff in this case argued that § 3701 mandated that the taxable value of the bank shares be reduced by the value of the federal obligations held by the bank. In this case, there is no statute similar to Rev. Stat. § 3701, and more importantly, under the Exemption Theory, none of the tax is attributable to Stock.

Petitioner also mischaracterizes the holding in *Hunt-Wesson, Inc. v. Franchise Tax Bd. of California*, 528 U.S. 458, 463-64, 120 S.Ct. 1022, 145 L.Ed.2d 974 (2000). In *Hunt-Wesson*, California eliminated a deduction, thereby increasing the tax owed, to the extent the taxpayer had nonunitary income. California was not entitled to directly tax nonunitary income, and this Court held that California could not

indirectly tax such income, through the disallowance of a deduction, either. This Court did note, however, that if California could show a reasonable effort to allocate the deduction between taxable and tax-exempt income, such a disallowance could be upheld, "even though such denials mean that the taxpayer owes more than he would without the denial." *Id.* at 466. However, California was unable to meet that burden. Once again, the problem was that the amount of tax owed included tax attributable to income that should otherwise be exempt. The amount of Capital Stock Tax owed by Petitioner, unlike Hunt-Wesson does not include tax on any of the Stock that Petitioner owes. As the numbers clearly show, the only items reflected in the amount of Capital Stock Tax owed are taxable property.

The Exemption Method clearly reduces the tax liability by the *exact* amount of tax attributable to Stock if it were subject to the Capital Stock Tax and taxpayers owning the same Taxable Assets have the same tax liability, *regardless* of whether or not they also own Stock. As a result, the exemption was given full force and effect, and there is no inconsistency with this Court's holdings in *Hunt-Wesson* and *American Bank*.

CONCLUSION

The cases the Petitioner cites in support of its position involve wholly dissimilar facts and legislation, and do nothing to challenge the holding of the

decision below. In addition, the challenged state statutory provisions were subsequently amended by the Kentucky General Assembly, making a decision on the merits of little help in resolving other cases.

The petition is full of factual distortions and misrepresentations of the statutes and law, including the omission of the preservation of the ERISA issue from the questions presented. Petitioner raises no serious doctrinal disagreement with the Kentucky Court of Appeals, but merely disputes whether that court properly applied settled precedents to the particular statutes under review.

As this Court has said "[w]e decline to reach the merits of this claim, however, because the courts below ruled that the claim was procedurally barred." *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. at 398. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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